

STATE OF MICHIGAN  
COURT OF APPEALS

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SCOTT R. HUDSON,

Plaintiff-Appellant,

v

CHRISTINE R. ANDRAUD-HUDSON,

Defendant-Appellee.

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UNPUBLISHED

April 17, 2007

No. 274246

Oakland Circuit Court

Family Division

LC No. 2006-718381-DM

Before: Neff, P.J., and O’Connell and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from the judgment of divorce that awarded defendant sole physical custody of their minor daughter Pauline, born January 7, 2004, and granted defendant’s motion to change Pauline’s domicile to Marseilles, France. We affirm.

Defendant first challenges the trial court’s order granting defendant’s motion to change the domicile of the minor child.

This Court reviews a trial court’s findings in applying the *D’Onofrio*<sup>[1]</sup> test under the great weight of the evidence standard. This Court reviews a trial court’s decision on a petition to change the domicile of a minor child for abuse of discretion. [*Brown v Loveman*, 260 Mich App 576, 600; 680 NW2d 432 (2004) (citations omitted).]

Change of a child’s domicile following a judgment of divorce is governed by the *D’Onofrio* factors, which are substantially codified in MCL 722.31(4). The statute provides, in relevant part:

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<sup>1</sup> *D’Onofrio v D’Onofrio*, 144 NJ Super 200, 206-207; 365 A2d 27 (1976), adopted by the courts of this state in *Dick v Dick*, 147 Mich App 513, 517; 383 NW2d 240 (1985).

Before permitting a legal residence change . . . , the court shall consider each of the following factors, with the child as the primary focus in the court's deliberations:

(a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.

(b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule.

(c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.

(d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.

(e) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

Applying the factors, the trial court found that the change of domicile had the capacity to improve defendant's and Pauline's quality of life under MCL 722.31(4)(a). Defendant established that she could earn a living as a full-time nurse in France, while language and cultural differences impeded her ability to work in the medical field in this country. Contrary to plaintiff's assertion, defendant did establish that there was a position available for her in France upon her return. Rather than quit her job in France, defendant took a leave of absence. Moreover, defendant showed that she was employed by the public health system and could easily be placed in a nursing position in one of the four public hospitals in Marseilles. A relocating parent's increased earning potential generally improves a child's quality of life. *Brown, supra* at 602. Contrary to plaintiff's assertion on appeal, it does not appear that the trial court determined that France was culturally superior to the United States. Instead, the trial court merely reasoned that Pauline had an equal right to live in either country, so the move would not be detrimental in that respect. The trial court's findings regarding the first factor did not run contrary to the great weight of the evidence.

The evidence also supports the trial court's determination that both parties had utilized their parenting time and that defendant's plan to move to France was not motivated by an intention to frustrate the original parenting time schedule. MCL 722.31(4)(b). The parties both spent significant time with Pauline every day. During the marriage, defendant primarily cared for Pauline while plaintiff worked. However, plaintiff worked from home and was also available to Pauline. Plaintiff shared his breakfast with Pauline every morning and sometimes joined defendant and Pauline for lunch. Plaintiff sometimes put Pauline to bed, but defendant admitted

that Pauline was going through a phase and wanted defendant to tend to her needs in the evening. Plaintiff always accompanied defendant on Pauline's doctor appointments. Following defendant's removal from the marital residence, the parties shared equal parenting time with Pauline. During his parenting time, plaintiff only worked in the morning to allow more time with his daughter. Plaintiff often took Pauline to his family's cabin and took full responsibility for her care during that time.

It is also worth noting that when defendant moved to the United States with plaintiff and Pauline, the parties had agreed to return to France on a permanent basis at some point in the near future. The evidence reveals that plaintiff was nearing retirement age and initially wanted to purchase a second home in France that would become the parties' only home. Although he contended at trial that his comments to friends were made in jest, defendant's evidence suggested that he told friends that he would be moving to France at some time in the future. Plaintiff admitted at trial that the parties could not agree where to live permanently in July 2004, seven months after Pauline was born and four months before they were married. Although plaintiff had made a promise to return to France with defendant and Pauline, he made little effort to learn French in preparation for the move. He subsequently had a change of heart and began coercing defendant to secure employment in Michigan.

Ultimately, plaintiff was aware from the beginning of this relationship that defendant would want to return to France in the event of a divorce. Defendant had no family and few friends in this country, and plaintiff had interfered with defendant's relationship with his sisters. Although the move would reduce plaintiff's contact with his child, defendant agreed to significant concessions to foster plaintiff and Pauline's relationship, including foregoing any financial assistance while in France and agreeing to vacate her home to allow plaintiff to visit with Pauline at less personal expense. Under the circumstances, the trial court's finding on this factor does not run contrary to the great weight of the evidence.

The evidence also supports the court's determination that plaintiff's parenting time schedule could be modified in a manner to preserve and foster his relationship with Pauline under MCL 722.31(4)(c). Defendant made significant concessions to ensure that plaintiff is able to visit with Pauline as often as possible. Under the trial court's order, plaintiff will have parenting time with Pauline for eight weeks every summer and can visit France as often as his schedule allows. Moreover, plaintiff will be able to communicate with Pauline "face-to-face" using web-cams. In short, plaintiff has been awarded unlimited parenting time in France, as well as eight weeks of summer parenting time in Michigan, so the trial court's modifications adequately ensured that the father-daughter relationship would be fostered and preserved.

Finally, the evidence supports the trial court's determination that the final two factors were irrelevant in this case. Plaintiff was the party opposing the move, and much of his support obligation was conditioned on defendant remaining in the country. Furthermore, the only incident of potential domestic violence described by the parties occurred on April 7, 2006, when defendant broke several personal items in the house. There is no evidence of any domestic violence beyond the isolated incident, and the expert testimony indicates that the episode had no bearing on defendant's ability to raise Pauline.

However, plaintiff contends that the modification of parenting time in this case effectively changed Pauline's established custodial environment, so the trial court was required

to consider the best interest factors in making its determination. We agree with plaintiff that the change in domicile effectively changed Pauline's established custodial environment, but the record reflects that the trial court accounted for the change in custodial environment in its analysis. Before determining whether the change in domicile was appropriate, the trial court considered the best interest factors of MCL 722.23, and found that defendant met her burden of proving with clear and convincing evidence that the custodial change and move to France was in Pauline's best interests. See *Brown, supra* at 583. Therefore, plaintiff fails to demonstrate any legal error in the trial court's approach.

Plaintiff's argument regarding the sufficiency of the evidence supporting the trial court's conclusion requires a more thorough review of the facts. The best interest factors related to a trial court's custody determination are found in MCL 722.23, which provides:

As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute.

The evidence in this case supported the trial court's finding for factor (a). According to Dr. Paul C. Jacobs, who observed both parties with Pauline, they each interacted well with Pauline and appropriately showed love and affection. Dr. Larry Friedberg, defendant's expert witness, observed only defendant with Pauline and testified that the two were physically affectionate and are tightly bonded. Judy Kirby, a mutual friend, testified that defendant had a mild manner with Pauline and indicated that she envied their mother-daughter relationship. However, Kirby also indicated that Pauline is happy and comfortable with plaintiff. Defendant admitted that Pauline and plaintiff love each other and recognized that Pauline would miss plaintiff after the move to France. Plaintiff admitted that Pauline needed her mother. This evidence also supported the trial court's finding that factor (b), capacity and disposition to give the child love, affection, and guidance, also favored both parties.

The evidence also supported the court's determination that both parties were equal in relation to factor (c). Plaintiff is self-employed and owns an interest in three companies. He recently received a sizeable inheritance following his mother's death and lives a comfortable lifestyle in a large lakeside house. While defendant was unemployed in this country, she could return to her nursing career in France. Prior to moving to the United States, defendant made an adequate income to support her and Pauline. Defendant's parents had also provided her with financial assistance in the past and lived nearby if defendant needed assistance in the future.

The evidence supports the court's finding that both parties were equal in relation to factor (d), the length of time the child has lived in a stable and satisfactory environment. Contrary to plaintiff's assertion on appeal, the trial court did consider Pauline's domicile in France as well as Michigan when assessing this factor. Although Pauline had lived in Michigan for most of her life, she was born in France and had returned to visit on several occasions with defendant. Her environment with both her mother and father was stable and satisfactory, and her environment with defendant would continue to be stable in France.

The evidence supports the court's finding that both parties equally provided a permanent custodial home under factor (e). Although plaintiff challenges the trial court's finding under this factor in light of his proposal to stay in the marital home and defendant's proposal to remove Pauline from the country, the statute specifically deals with the "permanence, as a family unit" of the proposed homes. Here, Pauline is an only child who would experience equal familial support in France as she does in Michigan. Plaintiff claims that he could provide permanence by continuing to raise Pauline in the former marital residence and sharing parenting time with defendant in Michigan, but that same permanence could be maintained if plaintiff moved back to France and shared parenting time there. Plaintiff's plan, however, would prevent Pauline from maintaining her familial relationships in France just as much as defendant's plan would prevent Pauline from maintaining her familial relationships in Michigan. In other words, the evidence supported the trial court's finding that each party would provide Pauline with the opportunity to experience as much permanence in her familial relationships as the other party was willing to provide.

The trial court found both parties equal in relation to factor (f), because neither party had alleged any issue regarding the other party's moral fitness to raise Pauline. Defendant insinuated

that plaintiff smoked marijuana and had deviant sexual impulses, but she never seriously asserted that these alleged traits affected plaintiff's moral fitness to raise Pauline. Likewise, plaintiff's unsubstantiated allegations that defendant had a mental disorder did not relate to her moral fitness as a parent.

The court also found the parties equal in relation to factor (g), the mental and physical health of the parties. Given that this issue was heatedly contested during the divorce proceedings, the court made lengthy findings in relation to this factor. Although this factor is a close call, the evidence supports the trial court's determination. The record indicates that plaintiff exaggerated defendant's purported "mental illness." Throughout their relationship, plaintiff accused defendant of having a mental disorder. He spoke about his theories with defendant's parents, his family and friends, and even with strangers in an Internet chat room devoted to the subject. The evidence suggests that plaintiff called defendant crazy in front of Pauline and told Pauline that defendant was "sick" during a post-separation visit. Plaintiff used his accusations of mental illness to his advantage during a recorded telephone conversation with defendant. Defendant figured out that plaintiff was taping their conversation and asked plaintiff about it. Plaintiff lied and told defendant that she was paranoid.

Defendant admitted that she suffered from depression but asserted that it was caused by the stress in her relationship with plaintiff. Dr. Jacobs reported that defendant was suffering from psychological problems or depression at the time of her interview. However, Dr. Jacobs conceded that the results could have resulted from the "high situational stress" of going through an acrimonious divorce far away from friends and family. Dr. Jacobs specifically found that the parties would function well outside of the marriage. Dr. Friedberg also testified that defendant suffered from depression. He definitively determined that defendant's depression was caused by recent events in her life and her relationship with plaintiff. Defendant admitted that she had expressed suicidal thoughts in the past, but Dr. Friedberg discounted the severity of these comments given that defendant had never taken steps toward suicide. In any event, Dr. Jacobs and Dr. Friedberg agreed that defendant's depression did not destroy her ability to parent Pauline. Under the circumstances, the evidence supported the trial court's findings.

The court also determined that both parties were equal in relation to factor (h), the home, school, and community record of the child. Although he did not first notify defendant, plaintiff enrolled Pauline in daycare. Defendant acknowledged that Pauline had done well in the daycare and began using the facility during her parenting time as well. Defendant planned to continue Pauline's education in France and had already enrolled her in school there. The trial court's findings regarding this factor did not run contrary to the great weight of the evidence.

Given Pauline's young age at the time of trial, the court declined to consider her preferences regarding custody under factor (i). Neither party challenges this finding on appeal.

The trial court also made a lengthy record analysis of factor (j), willingness and ability of the parties to foster a relationship between the child and the other parent, given defendant's plan to move Pauline to another country. The court ultimately determined that this factor favored defendant, and the evidence supports the trial court's determination. The court's lengthy explanation for its conclusion included a litany of facts that found ample support in the record. The facts demonstrated that plaintiff's unwillingness to communicate with defendant discouraged Pauline's relationship with her mother. Plaintiff admitted that he failed to

specifically inform defendant that he had enrolled Pauline in daycare, and the evidence demonstrated that plaintiff failed to provide the daycare center with defendant's contact information. Plaintiff asserted that he did not need permission to enroll Pauline during his parenting time. Plaintiff also admitted that he had taken Pauline to his family's cabin without informing defendant of their whereabouts. Plaintiff secretly taped his telephone conversations with defendant and lied to her about it. Plaintiff also completely blamed defendant for the breakdown in the relationship, even though he had reneged on his promise to move to France, and had pressured defendant to return to work after promising that she could be a stay-at-home mother. Throughout the proceedings, plaintiff battled against providing any financial support to defendant even though she had moved to this country at his behest. The evidence indicates that plaintiff also interfered with defendant's relationship with his sisters, destroying any family support that she had in this country. Despite plaintiff's behavior, defendant was willing to make significant concessions to ensure that plaintiff could visit Pauline in France as often as possible. In the end, the trial court's findings were supported by the record.

The trial court also found that the parties were equal with respect to factor (k), domestic violence. The court recognized that "there was tension between the parties," but found that "domestic violence was not a factor in their relationship." We disagree with plaintiff that an isolated outburst by defendant requires a different determination on this factor. Defendant admitted that she smashed a DVD player, picture frame, and lamp. Defendant further admitted that she hit plaintiff's truck with a hammer that night. Despite this incident, Dr. Jacobs found that domestic violence was not a factor in this case. Dr. Friedberg described the incident as an act of anger, not violence. Dr. Friedberg conceded that defendant acted badly, but added that the behavior was rather common for individuals going through a divorce.

Regarding factor (l), the court explained:

This case is unusual because Defendant is not a U.S. citizen. She is here as a permanent resident due to her marriage. It is likely, based on the testimony of immigration attorney Mr. Albert Valk that Defendant would be allowed to remain in the U.S. even after the divorce. It is not, however[,] guaranteed. Defendant has indicated that it is her desire to return to live in France. She never planned to live in the U.S. and came only to marry Plaintiff and provide Pauline with a family. Due to the divorce, she has no[] desire to remain here. She has a job in France and her friends and family are there. Pauline is a U.S. citizen but is also a citizen of France. Much was made at trial of Pauline's recent refusal to speak French. Given Pauline's age, it is impossible to know why. Defendant suspects Plaintiff has influenced Pauline to only speak English. Plaintiff denies this. It is most likely that Pauline is expressing some difficulties and adjustments due to the divorce. In any case, Pauline has spoken both languages and clearly understands both English and French.

The evidence supported the trial court's findings on this final factor.

Therefore, the trial court found the parties to be equal in regard to most of the best interest factors. However, the evidence supports the court's conclusion that defendant is better able to foster a relationship between plaintiff and Pauline. This was a key element to this case, because plaintiff's actions evidenced his intent to put as much emotional, and eventually

physical, distance as possible between defendant and the rest of his family, including Pauline. Considering all the facts in this case, the trial court acted within its discretion when it granted sole physical custody to defendant and allowed her to return to France with Pauline.

Plaintiff further contends that the trial court abused its discretion in striking his witness list and precluding him from presenting certain witnesses at trial. The trial court's decision sanctioned plaintiff because he failed to file his witness list until 4:30 p.m. on the Friday before a Monday morning trial date. We review for abuse of discretion a trial court's determination to exclude the testimony of a tardily revealed witness. *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 90; 618 NW2d 66 (2000). Moreover, a trial court "may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown." MCR 2.401(I)(2).

Here, the only explanation provided by plaintiff for his failure to timely file a witness list was that his counsel had gone on vacation when the witness list was due and returned to a trial in another case. However, an attorney's negligence is ordinarily imputed to the client, *Amco Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 96; 666 NW2d 623 (2003), and "a busy schedule and a heavy caseload do not constitute a reasonable excuse for failure to file a timely answer." *Daugherty v State (After Remand)*, 133 Mich App 593, 598; 350 NW2d 291 (1984). Accordingly, we agree with the trial court's determination that the exclusion of plaintiff's witnesses at trial was proper under the court rule.

The exclusion of plaintiff's witnesses was also proper under the following factors enumerated in *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990), which a trial court should consider when determining the appropriate sanction for failing to properly file a witness list:

(1) whether the violation was willful or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the defendant; (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice; (5) whether there exists a history of plaintiff's engaging in deliberate delay; (6) the degree of compliance by the plaintiff with other provisions of the court's order; (7) an attempt by the plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. [*Id.*]

In this case, plaintiff had repeatedly failed to notify defendant of his potential witnesses at trial. He did not identify any potential witnesses in his answers to defendant's interrogatories and failed to file a witness list until the eve of trial. Therefore, defendant had no time to prepare for plaintiff's proposed witnesses and would have been prejudiced by their presentation at trial. Moreover, the trial court softened the sanction by agreeing to allow plaintiff to call certain witnesses if their testimony was "absolutely necessary."

During the course of trial, the court granted plaintiff's request to call his accountant, but plaintiff never called that witness. The trial court also granted plaintiff's request to call a representative of the Board of Nursing to rebut defendant's testimony that she was unqualified to work in Michigan. However, plaintiff again failed to call that witness at trial. Ultimately, the trial court allowed plaintiff to present the testimony of an immigration attorney to rebut



defendant's purported contention that she would not be allowed to remain in the United States following the divorce. The court also allowed plaintiff to call a real estate appraiser to rebut the testimony of defendant's expert regarding the value of the marital residence. The trial court only denied plaintiff's request to present the testimony of rebuttal witnesses regarding his character, namely his sister, Patti Jackson, and godparents, Zelda Grant and Bob Grant. The court denied plaintiff's request because the testimony would be cumulative and because it appeared that plaintiff was attempting to "circumvent" its order excluding plaintiff's witnesses. Although plaintiff challenges the exclusion of Dr. Jacobs as a witness at trial, defendant stipulated to the admission of his report, and the court considered that report in reaching its ultimate verdict. Further, plaintiff never called or asked permission to call Dr. Jacobs to the stand. Under the circumstances, the trial court's sanction was not as drastic as plaintiff claims and did not constitute an abuse of discretion.

Finally, plaintiff challenges the trial court's award of limited spousal support to defendant and the award of attorney fees. The trial court ordered plaintiff to pay defendant \$2,500 each month for a period of 24 months or until defendant passed away, married, or moved to France. We review a trial court's award of spousal support for an abuse of discretion. *Gates v Gates*, 256 Mich App 420, 432; 664 NW2d 231 (2003). In awarding spousal support, a court must consider the following factors:

(1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity. [*Sparks v Sparks*, 440 Mich 141, 159-160; 485 NW2d 893 (1992).]

The court recognized that this case involved a short-term marriage of only 15 months. At the time of the divorce, plaintiff was 57 years old and defendant was 40. The trial court recognized that plaintiff had been the sole financial provider during the marriage, while defendant maintained the home and cared for Pauline. The parties had agreed that defendant need not work outside of the home and that plaintiff would provide for all the financial needs of defendant and Pauline. The court found that both parties were equally physically healthy.

In awarding limited spousal support, the trial court was sympathetic to the fact that defendant moved to the United States for plaintiff and was hesitant to work in this country. The court noted that defendant gave up her career and the support of family and friends to move to a foreign country and provide a nuclear family for her child. Defendant remained unemployed in the United States, primarily because language and cultural differences would have made nursing difficult. Plaintiff, on the other hand, was capable of providing short-term financial support to defendant. He was self-employed and had considerable income as well as access to savings and assets. Under the circumstances, the court found that defendant was in need of financial support while she remained in this country. Upon her return to France, however, defendant would not require support because she could resume her nursing career. We do not find any abuse of discretion in the trial court's decision.

The trial court also awarded defendant \$15,000 in attorney fees. We review a trial court's determination to award attorney fees in a domestic relations case for an abuse of discretion. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). In awarding attorney

fees, the trial court considered each party's income and ability to earn along with their individual assets. The court noted that plaintiff was self-employed and had earned \$190,000 in 2005, noting that plaintiff had earned substantially less in prior years. The court also noted that defendant had been unemployed for the prior two years while living in the United States. Plaintiff had significantly larger premarital assets than defendant. Plaintiff owned a \$600,000 lakefront home, maintained significant investment and retirement accounts, and owned an interest in several businesses. Defendant's only assets were two bank accounts with a total value of approximately \$80,000. Defendant had saved this money to finance her move back to France and to establish her new home. Plaintiff had initially encouraged defendant not to work and was quite capable of shouldering the expenses of litigation. Accordingly, the award of attorney fees was justified under MCR 3.206(C)(2)(a). *Reed, supra*.

Affirmed.

/s/ Janet T. Neff  
/s/ Peter D. O'Connell  
/s/ Christopher M. Murray